

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION)	
FOR DELIVERY CALL OF A&B)	DOCKET NO.
IRRIGATION DISTRICT FOR THE)	37-03-11-1
DELIVERY OF GROUND WATER AND)	
FOR THE CREATION OF A GROUND)	PRE-HEARING
WATER MANAGEMENT AREA.)	CONFERENCE ORDER
)	

FINDINGS

1. This matter was initiated by the filing of a petition on July 27, 1994, by the A&B Irrigation District (hereafter A&B or A&B Petition) for a priority delivery call for ground water from the Eastern Snake Plain Aquifer and for the creation of a Ground Water Management Area.

2. Notice of the A&B Petition was served by regular mail upon approximately 7200 holders of water rights (respondents) who divert ground water from the Eastern Snake Plain Aquifer with priorities later-in-time than September 9, 1948, the water right priority date claimed by A&B as beneficial owner. Responses were received from approximately 200 individual well owners or representatives of groups of well owners. Several of the responses were received after the September 16, 1994 deadline specified in the notice and are considered to be requests for intervention in the matter. The names of persons filing late responses were included on the service list. The following additional late responses were received after the original service list was prepared:

Jess D. and Della Keeler
3627 East 960 North
Menan, Idaho 83434

Eldon E. Scott
P.O. Box 454
Firth, Idaho 83236

Neil J. or Marita Poulson
2849 N Pleasant Valley Road
American Falls, Idaho 83211

3. A pre-hearing conference concerning the matter of the A&B Petition was held at Minidoka County High School on November 16, 1994. At the conference, the attorney for A&B presented the outline of a proposed stipulation by the parties which would allow the matter of the contested case to be held in abeyance for a time. Several spokespersons for respondents indicated general support for the proposal, but acknowledged that they could not speak for the entire group of respondents. The Department (IDWR) agreed to withhold further action on the A&B Petition to allow the parties an opportunity to attempt to reach agreement on a stipulation.

4. Attorney Henry Boomer of Boomer & Laggis, American Falls, Idaho offered to reduce the proposed stipulation to writing and to circulate it to those on the service list for comment. The IDWR received a draft stipulation on March 20, 1995, from Mr. Boomer with an indication that it had been "negotiated by a fairly representative group of water users affected by the A&B call" and had been mailed to the petitioner and all respondents on the service list. Parties were asked to indicate their agreement to the proposed stipulation or objections within two weeks of the mailing.

5. The proposed stipulation is as follows:

Come now the Petitioner A&B Irrigation District and Respondents, in their effort to reach an informal resolution of Petitioner's *Petition* for a delivery call for the delivery of ground water and the creation of a ground water management area, stipulate and agree, as an interim solution, to encourage and support the following action by others or to take the following actions, to-wit:

1. IDWR adopt and implement an active enforcement plan, including the adoption of necessary rules and regulations, to:

a. Eliminate all illegal ground water diversions within the Eastern Snake Plain Aquifer ("ESPA") as defined in the Conjunctive Management Rules of IDWR dated October 7, 1994.

b. Eliminate all emergency diversions within the ESPA that were previously authorized by IDWR, if any, and to eliminate all future emergency diversions.

c. Eliminate diversions from ground water under supplemental water rights except where the appropriator shows to the Director of IDWR that water under an existing primary right is not available for reasons that were not caused by the voluntary acts of the appropriator.

d. Eliminate the diversion of water under a supplemental water right that is being exercised as an "alternative" or "new permanent source" of water, unless it can be established that the supplemental water source is merely a change in the point of diversion of the primary water right being supplemented.

e. Eliminate all transfers of supplemental water rights unless transferred with the primary water rights and are made appurtenant to the same land and for the same use.

2. IDWR shall require measurement of all ground water diversions in the ESPA, including annual volume of water diverted during each calendar year and a representative tabulation of changes in ground water levels at various times during each year at representative points of diversion in the ESPA. The parties intend that the responsibility for measurement be taken over by ground water (management) districts, irrigation districts, water districts or similar organizations having the authority to assess water right holders for this and related purposes. If ground water diversions are measured by an entity in which the lands being irrigated are located and are subject to its assessments, a plan for measuring representative diversions and ground water tables may be presented to the Director of IDWR, and if sufficient data is obtained under this plan and the plan is accepted by the Director, other diversions under the jurisdiction of the entity shall be monitored during the irrigation season but need not be measured.

3. IDWR shall require measurement and proper recording of all surface water diversions as shall be determined necessary from time to time to insure the proper allocation, distribution and conjunctive management of a water resource.

4. The parties will establish a working group consisting of representatives of all parties to evaluate mitigation methods, plans and proposals in the ESPA.

5. All parties hereto will cooperate in the submission of legislation in the 1995 legislative session and support its passage which will authorize the formation of a water measurement district which shall have power to:

a. Levy assessments on the lands within the district to which a water right is appurtenant or upon which water under a water right is used, based upon benefits received, to reimburse the water management (measurement) district for operating expenses of the district;

b. Measure all water diversions and ground water levels within the district which may be required under Chapter 7 of Title 42, Idaho Code, and to submit such reports as may be required to IDWR;

c. Demand installation of appropriate measuring devices or the adoption of alternative measurement methods by appropriators or users of any of the public waters of the State of Idaho with the district as may be necessary in the exercise of the powers and duties of the water measurement district.

d. Contract with existing water organizations to measure water diversions within the boundaries to avoid assessments for measuring by the water measurement district.

6. IDWR shall continue its current moratorium on the granting of new applications for the appropriation of ground water in the ESPA until a final resolution, with or without a formal contested case hearing, has been reached involving the issues involved in this proceeding.

7. IDWR shall continue in force and effect its Order suspending the development of existing ground water permits until such time as a final resolution of the issues arising in this proceeding has been obtained.

8. Further studies and evaluation by IDWR and respondents will be conducted for the purposes of determining whether or not IDWR should designate the ESPA as a ground water management area. The parties will continue to cooperate in their efforts to obtain a ground water management plan for the ESPA.

9. The parties hereto will not oppose the approval by the 1995 legislature of the State of Idaho of the conjunctive management rules adopted by IDWR on October 7, 1994.

10. IDWR shall retain jurisdiction of these proceedings during the implementation of the interim solution and will stay all proceedings on a formal contested case hearing until petitioner or a respondent or respondents file a *Motion to Proceed* with a formal contested case hearing. During the stay of proceedings, all formal discovery provided by the administrative rules of IDWR shall be suspended, and the exchange of information between the parties shall be upon an informal and voluntary basis.

11. The parties, as a part of the informal process in these proceedings, shall continue to review, consult and support additional measures which may become a part of an interim solution, which may lead to a final resolution of the petition.

DISCUSSION

1. The proposed Stipulation provides that the parties "encourage and support" several actions which the parties request be taken by IDWR. The ability of the IDWR to take some of the requested actions is dependent upon legislative appropriations and authorization for increased staff positions. Also, several of the proposed actions have already been accomplished by the Legislature. IDWR provides the following comments on those paragraphs of the stipulation involving actions by the IDWR or the Legislature:

1.a. Eliminate illegal ground water diversions - Full implementation of this provision contemplates completion of the on-going adjudication to determine legality of diversions, a water diversion measurement and reporting program and an expansion of existing water districts or the creation of new water districts and increased oversight by the department.

1.b. Eliminate all emergency diversions - No emergency diversions have been allowed since single-season use was permitted during the drought year of 1992.

1.c., d., and e. Eliminate diversions under supplemental water rights and transfers of supplemental rights under certain conditions - Provisions c and e raise potential "takings" issues and may require amendment of Idaho water law.

2. Measure all ground water diversions in ESPA - Measurement of ground water diversions has begun on a pilot program basis. It may be several years before it can be extended to the entire ESPA.

3. Measure all surface water diversions - Within existing water districts diversions are presently being measured. Proper installation and maintenance of measuring devices and reporting of water diverted continues to be a concern within many water districts.

4. Ground water district legislation - The First Regular Session of the 53rd Idaho Legislature passed, and the Governor has approved, HB 284 which authorizes the creation of water measurement districts and HB 323 which authorizes the creation of ground water districts.

5. Continue current moratorium on new permits - The 1994 Legislature made the Director's moratorium on new permits in that portion of the Snake River Basin upstream from King Hill, Idaho effective through December 31, 1997.

6. IDWR to continue in force its order suspending development under existing ground water permits - Actions suspending development under the outstanding permits for new diversion from ESPA have been completed.

7. Give further consideration to designation of ground water management area. This proposed action can be held in abeyance under the retained jurisdiction of the IDWR.

8. Parties will not oppose legislative approval of Conjunctive Management Rules - The rules were reviewed by the 1995 Legislature and are effective as adopted by the Department. The rules are currently the subject of court action.

9. IDWR to retain jurisdiction over petition. The Department may retain jurisdiction over the petition until such time as a final decision is rendered or the petition is withdrawn.

2. With the large number of potentially-affected respondents involved in this matter, it is difficult to ascertain that all respondents are in agreement with the stipulation. An effort has been made to keep all parties informed and they have had the opportunity to raise any objections. By mailings from Mr. Boomer dated April 6, 1995 and April 20, 1995 the Director received copies of a total of nine comments on the proposed stipulation.

These comments were filed by or on behalf of the following respondents:

Water Resource Coalition
Michael Branchflower
James A. Grubbs
Lila, George, Debbie, Steve and Elizabeth Oleson
A. Woodrow Peterson
City of Chubbuck
Boise Cascade Corporation
Everett H. and Betty Adkins
U.S. Department of Energy

3. Those commenting on the circulated draft stipulation either support it or raised the following issues:

a. There is concern over the definition of "supplemental water" as used in paragraphs 1.c., d., and e. of the draft stipulation.

b. It is proposed that return flows from ground water diversions be included in any measurement program.

c. It is suggested that the phrase "public waters of the State of Idaho" be defined.

d. It is asked that the moratorium on new permits remain in place until completion of the Snake River Basin Adjudication.

e. Petitioner, A&B, should be required to show injury.

f. Opposition was expressed to any water measurement program.

g. Since the 1995 Legislature adopted enabling legislation for ground water districts and water measurement districts, the call for enactment of such legislation should not be part of the stipulation.

h. The term "monitored" as used in the draft stipulation should be defined.

4. The IDWR should accept the draft stipulation as the consensus position of the parties. Those provisions already accomplished by legislative action should be acknowledged. Other provisions of the proposed stipulation should be adopted in the pre-hearing conference order to the extent the Director has the authority and capacity to accomplish the matters contained therein.

5. The IDWR should allow those who filed late responses to the notice of the A&B Petition to intervene in the proceeding.

6. The IDWR should deny all motions from individual respondents to dismiss the A&B Petition.

7. The IDWR should order that this matter shall proceed under the Rules for Conjunctive Management of Surface and Ground Water adopted October 7, 1994 instead of under the Temporary Rules Governing Conjunctive Management of Surface and Ground Water under which it was filed on July 27, 1994.

8. The IDWR should dismiss from the matter all those respondents who divert water from outside of the area described as the "Eastern Snake Plain Aquifer" as defined in Rule 50.01 of the Rules for Conjunctive Management of Surface and Ground Water.

ORDER

IT IS HEREBY ORDERED that the proposed Stipulation is adopted in part as the pre-hearing conference order of the IDWR, pursuant to Rule 513 of the IDWR's Rules of Procedure, and actions called for in the Stipulation will be accomplished in so far as possible using available departmental resources as follows:

1. IDWR will develop a plan for management of the ESPA which will provide for active enforcement of diversion and use of water pursuant to established water rights. Such plan will be adopted and implemented under the Administrative Procedure Act.

2. No drought-related emergency permits to divert ground water from the ESPA for limited seasons or periods of time will hereafter be issued except as provided in section 42-202A, Idaho Code.

3. IDWR will propose rules for supplemental water rights under the Administrative Procedure Act defining the term "supplemental water right", and governing the use and transfer of such rights and the relationship of use of water under such rights to the primary rights which they supplement.

4. IDWR will continue to seek to fully implement the provisions of section 42-701, Idaho Code, regarding the measurement and reporting of diversions of water statewide and particularly from the ESPA. This effort will expand as funding and staffing are made available. It will include the organization of water measurement districts as provided in title 42, chapter 7, Idaho Code, as amended by Chapter 291, 1995 Session Laws.

5. The amended moratorium order on appropriations of surface and ground water from the Eastern Snake River Plain Area entered by the Director on April 30, 1993 and subsequently approved and confirmed by the Legislature in Chapter 449, 1994 Session Laws shall remain in place at least through December 31, 1997 as provided by law.

6. IDWR retains jurisdiction of the petition for the purpose of continued review of information concerning water supply, the impact of use of ground water on other uses of the resource and the determination and designation of the ESPA as a ground water management area.

IT IS FURTHER ORDERED that action on the Petition is hereby stayed until further notice to the parties. Any party may file a Motion to Proceed at any time to request the stay be lifted.

IT IS FURTHER ORDERED that those respondents who filed late responses to the A&B Petition prior to the date of this Order are granted intervention in the matter and may appear in any further proceeding as though their responses were timely filed.

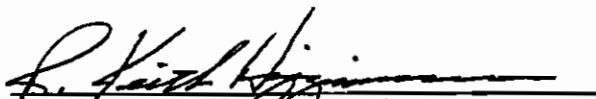
IT IS FURTHER ORDERED that motions to dismiss the A&B Petition are denied.

IT IS FURTHER ORDERED that this matter shall proceed under the Rules for Conjunctive Management of Surface and Ground Water adopted October 7, 1994.

IT IS FURTHER ORDERED that those respondents who received notice of the A&B Petition and who divert water outside the area of the Eastern Snake Plain Aquifer as defined in Rule 50.01 of the Rules for Conjunctive Management of Surface and Ground Water are dismissed from this proceeding.

Any party aggrieved by any provision of this interlocutory Order may petition the Director for review pursuant to Rule 711 of the Rules of Procedure of the Department of Water Resources within fourteen (14) days of the service date of this Order.

DATED this 1st day of May, 1995.



R. KEITH HIGGINSON, Director